APPENDIX A

Affidavit of Marshall L. Small

STATE OF CALIFORNIA,
CITY AND COUNTY OF SAN FRANCISCO, *ss.*

MARSHALL L. SMALL, being first duly sworn, deposes and says that:

1. Attached hereto as Exhibit 1 is a copy of letter dated March 10, 1961, from Burton Marks, attorney at law, to the District Court of Appeal, Second Appellate District for the State of California, which copy was furnished to Affiant by Petitioner, Willie Wade, Jr. By letter dated September 3, 1969, the office of the Clerk of the California Court of Appeal for the Second Appellate District advised Affiant that the registar of actions shows the following entry: "MAR 21, 1961, Filed letter of Marks-to write brief for Wade only."

2. Attached hereto as Exhibit 2 is a copy of letter dated August 21, 1961, from Burton Marks, attorney at law, to the District Court of Appeal for the Second Appellate District for the State of California, which copy was furnished to Affiant by the office of the Clerk of the Court of Appeal for the First Appellate District in San Francisco, California, to which had been transmitted the transcript in the case of *People* v. *Wade, et al.*, for perusal by Affiant.

/s/ MARSHALL L. SMALL
Marshall L. Small

Subscribed and sworn to before me this 2nd day of October, 1969.

/s/ ELLEN M. SMITH
Notary Public
in and for the State of California
with principal office in the City
and County of San Francisco

[Notarial Seal]

My commission expires:
Feb. 14, 1972

EXHIBIT 1

BURTON MARKS
ATTORNEY AT LAW
GALE-WILSHIRE BUILDING
212 SOUTH GALE DRIVE
BEVERLY HILLS, CALIFORNIA

OLIVE 3-0211

March 10, 1961

District Court of Appeal
Second Appellate District
Division Two
State Building
Los Angeles, California

Re: *People* vs. *Pollard and Wade;* 2nd Crim. 7496

Gentlemen:

I was appointed by this Court to represent defendant Willie Wade, Jr. in his appeal to this Court, and was also asked to review the position of the co-defendant Joe Lewis Pollard.

The delay in presenting this letter to the Court resulted in counsel's inability to obtain the transcript from the defendants until last week.

I have carefully reviewed the record, and have come to the following conclusions, the reasons for which I will amplify:

1. Judge Drucker accorded both the defendants one of the most fair and impartial trials this counsel has had opportunity to observe. All objections and motions (save one, see infra) were resolved in favor of the defendants.

2. Both defendants were afforded excellent representation, insofar as this counsel can see, all favorable evidence on behalf of the defendants was presented.

3. The record is free from *reversible* error.

4. There *may* be legal error in the refusal of the Court to give an instruction as to second degree murder, but as will be seen further on, this error in a very practical sense would not seem to have prejudiced the defendants except for the length of time of their parole if parole is granted in the future.

Counsel respectfully requests this Court in light of this letter to advise counsel whether or not he should prepare an Appellant's Opening Brief, or be relieved as counsel for the defendants.

Analysis of the Case

The encapsulated facts most favorable to support the judgment are as follows:

On October 16, 1959, Kenneth Albert Swift, Deceased, attended a lathers union meeting at Third and Bixel Street in downtown Los Angeles. After the meeting, in the company of several friends, he had some drinks at a couple of downtown bars. He then went to a place known as the B & B or B & E Cafe on Central Avenue with three or four of his companions, with the apparent intention of locating some female companionship for the night.

Mr. Swift met the defendant Wade at the Central Avenue establishment between 12:00 and 1:00 A.M. on the 17th. Mr. Swift then left the B & B Bar in the company of Mr. Wade, and Mr. Swift drove down to Compton Avenue to a liquor store in the Compton area. They were followed by Joe Ray Tipton, a friend of Mr. Swift's.

Tipton and Swift conversed together for a short time, while Wade went into a house across the street and into a beer joint. Mr. Tipton, shortly after, told Mr. Swift that he was going home (this appears to have been shortly be-

fore 2:00 A.M. since the bars were still open). This was the last time that Mr. Tipton saw Mr. Swift alive.

At about 11:00 o'clock in the morning of October 17, 1959, sheriff's deputies discovered Mr. Swift's body lying in a vacant field at the dead end of 148th Street in the Compton area. The body showed signs of bad beating. All identification and personal items had been removed from the pockets, and the shoes were missing. Testimony of the coroner's office indicated that death had resulted from the beatings. It also showed a blood-alcohol index of .26, indicating a high degree of intoxication on the part of Mr. Swift prior to his demise. Mr. Swift's automobile was found in the Compton area a few blocks away from an address at 2702 Lantana Street, which is the scene of some additional evidence concerning the defendants.

Persons at that residence testified that the defendants Wade and Pollard arrived at the Lantana address at about 8:00 o'clock the morning of the 17th. Mr. Wade had blood on his trousers, and they were washed off. There was also testimony to the effect that Mr. Wade and Mr. Pollard indicated that they had just killed or beaten someone and had taken his car.

The sheriff's deputies testified to conversations had with the defendants where certain admissions were made by both defendants as to their presence at the field. Mr. Pollard stating that he had led the group onto the filed, but that Mr. Wade had inflicted the beatings. There was some question as to the voluntary nature of these admissions or confessions, but obviously this fact was resolved in favor of the prosecution upon submission to the jury.

The defense of both defendants was alibi. Pollard denied having been with Wade at all during the evening or morning of the 17th. Mr. Wade denying that he had been with Mr. Swift after leaving the liquor store on Compton Boulevard.

The jury returned a verdict of first degree murder against both defendants, and after a second hearing on punishment, a recommended life imprisonment for Mr. Pollard and the death sentence for defendant Wade. At

the motion for new trial, pursuant to the provisions of §1181 of the Penal Code, the death sentence of Mr. Wade was reduced to life imprisonment by the trial court.

It should be noted here that two questions were presented by the defendant Wade just prior to the hearing of the motion for a new trial (R.T. 712 et seq.), first being a request for removal of his counsel Mr. Rosen, and the second that he was deprived of due process of law and that he, the defendant Wade, was not prosecuted by an indictment, citing California Constitution Article I, Section 8 and the Fifth Amendment of the United States Constitution.

As previously pointed out and amplified by the court, Wade's counsel Mr. Rosen was highly competent, and had given Mr. Wade every possible defense. Furthermore, it was through the argument and research of Mr. Rosen that certain facts were pointed out to the court which convinced the court that Mr. Wade should have his sentence reduced to life imprisonment because of a probable defective intelligence and reasoning.

As to the second argument, prosecution upon information instead of indictment does not violate the Constitution of the United States, and the United States Constitution, Amendment V relates only to proceedings in the courts of the United States.

People vs. *Hurtado* (1883), 2 C.U. 206, 12 P.C.L.J. 106;
People vs. *Wallach* (1926), 79 Cal. App. 605, 250 P. 578.

The most serious contention of the defendants that can be raised on appeal is the failure of the court to give an instruction on second degree murder, which was argued at the motion for a new trial (R.T. p. 732, et seq.).

The theory of the defense is that a defendant is entitled to inconsistent defenses of alibi and murder arising out of an assault instead of robbery. Cf. *People* vs. *Conte,* 17 Cal. App. 771, 122 P. 450.

Further, it is error to deny a defendant a reasonable theory of defense. Cf. *People* vs. *Matlock,* 336 P. 2d 505.

In the instant case, it was the People's contention that the defendants committed murder in the perpetration of robbery. The defense wanted to argue that even though a robbery may have been committed, that the murder was not committed in perpetration thereof; that perhaps the idea of robbery or theft occurred afterwards in point of time or that the murder had occurred in the course of an unlawful assault without any intent to rob.

Of course, where there is overwhelming evidence of the crime of murder or it being perpetrated in the course of a robbery, it is not error to refuse an instruction defining the degrees of murder. *People* vs. *Williams,* 174 Cal. App. 2d 364, 345 P. 2d 763 (Robbery-murder case).

People vs. *Dorman,* 28 Cal. 2d 846, 172 P. 2d 686 (Robbery-murder case);

People vs. *Riser,* 47 Cal. 2d 566, 305 P. 2d 1 (Robbery-murder case).

As a practical matter in the instant case, if the jury were given instructions as to second degree murder, and counsel for defendants were allowed to argue the fact of doubt as to how and in what manner the murder was committed, the jury may have brought in a verdict of second degree murder.

The practical effect of the difference in the verdicts and sentences is that second degree murder carries a term of five years to life, whereas the present sentences imposed are life imprisonment. In the first instance, the adult authority could grant parole to the defendants prior to the mandatory seven years required in a life sentence. Further, it is absolutely certain that the term of imprisonment as to both defendants would be fixed at "life" as is the mandatory sentence herein imposed.

Although the error pointed out by this counsel may be a substantial one, it is not the type of error that would require a reversal since the evidence is substantial in supporting a conviction of murder in some degree.

This court, on appeal, has authority under Section 1181 and 1260 of the Penal Code to modify a judgment of murder in the first degree by reducing the degree of the crime to murder in the second degree. It has been stated that such authority should only be exercised where evidence fails to support a judgment of murder in the first degree.

People vs. *Cartwright,* 147 Cal. App. 2d 263, 305 P. 2d 93.

For the reasons above stated, counsel respectfully requests instructions from this court as to the necessity of filing Appellant's Opening Brief, or whether the writer should be relieved as counsel for the appellants.

Very truly yours,

BURTON MARKS

BM:SL

cc: Attorney General's Office
Willie Wade, Jr.
Joe Lewis Pollard

EXHIBIT 2

BURTON MARKS
ATTORNEY AT LAW
GALE-WILSHIRE BUILDING
212 SOUTH GALE DRIVE
BEVERLY HILLS, CALIFORNIA

OLIVE 3-0211

August 21, 1961

District Court of Appeal
Second Appellate District
Division 2
State Building
Los Angeles 12, California

Re: *People* vs. *Willie Wade, Jr., etc.*
2nd Crim. No. 7496

Gentlemen:

On February 6, 1961, I was appointed as counsel to represent the appellant Willie Wade, Jr. on his appeal.

On March 10, 1961, I addressed a lengthy letter to the court, reviewing the instant case, and informing this Court that in my opinion there was no reversible error, and requesting advice as to whether counsel should continue as attorney for the appellant and prepare an opening brief or be relieved as counsel for the appellant. Shortly, thereafter, I received a telephonic communication from your Clerk, advising me that the Court desired that an Appellant's Opening Brief be filed.

I estimate that I spent approximately 20 to 25 hours in preparing the appeal. This includes the research done on the matter set forth in the letter of March 10, 1961.

I respectfully request that this Court give me reasonable compensation for the time and effort expended. I do not contemplate that there will be any petitions for rehearing nor any petitions for hearing in the Supreme Court.

Thank you for my appointment, and I hope that I may be of further service to this Court in the future.

Very truly yours,

/s/ B. Marks
Burton Marks

BM:sl

[Stamp—Dist. Court of Appeal, Second Dist., Filed Oct. 18, 1961, J. E. Brown, Clerk]